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No. 85-1334 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD ROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in order for a district court to enforce a grand jury subpoena directing an attorney for a target of the grand jury's investigation to produce relevant and non-privileged evidence of fees he received from the target, the government must make a threshold showing that the information is necessary to the grand jury's investigation and that there is no reasonably available source for the information other than the attorney.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-54a) is reported at 781 F.2d 238. The prior opinion of the panel is reported at 759 F.2d 968.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1986, and the petition for a writ of certiorari was filed on February 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A federal grand jury in the Eastern District of New York is conducting an investigation of an organized crime family and a faction (crew) of the family that allegedly is under the direction of petitioner. The grand jury is currently

investigating a potential conspiracy charge under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d). The predicate offenses of the RICO conspiracy include narcotics trafficking, racketeering, robbery, gambling, extortion, interstate transportation of stolen property, and other federal crimes. Pet. App. 4a.

On September 5, 1984, a grand jury subpoena duces tecum was served upon petitioner's attorney, John Doe.[1] The subpoena commanded John Doe to appear before the grand jury and to produce records of " 'fees, monies, property or things of value' " he received from or on behalf of 21 named individuals, including petitioner (Pet. App. 5a (citation omitted)). The subpoena specifically called for records of fees received by John Doe in connection with his representation of some of the named individuals in certain state and federal criminal proceedings. The grand jury seeks the information to determine whether petitioner paid or otherwise arranged for the legal representation of persons believed to be members of his crew. Evidence of such benefactor payments might establish that petitioner was the head of an "enterprise" within the meaning of the RICO statute (18 U.S.C. 1961(4)). The government represented that petitioner would not be questioned concerning fees he received from petitioner for legal services provided to petitioner, but only for services provided to others (Pet. App. 4a-5a).

John Doe filed a motion to quash the subpoena pursuant to Fed. R. Crim. P. 17(c) on October 5, 1984. The district court denied the motion to quash. Petitioner then was granted intervenor status for the purpose of taking an

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[1]Although the names of petitioner and his attorney are used in the opinion of the en banc court of appeals, that court, by order dated January 30, 1986, granted petitioner's motion for restoration of the original caption of the case by the omission of the true names of petitioner and his attorney (Pet. App. 56a).

appeal, and the government consented to forgo enforcement of the subpoena until resolution of the appeal by the court of appeals. 759 F.2d 968, 970-971 (1985).

2. On April 1, 1985, a divided panel of the court of appeals reversed the order denying the motion to quash. The panel noted that petitioner conceded that the subpoenaed material was not protected by the attorney-client privilege. 759 F.2d at 971 n.3. However, the majority found that although petitioner's Sixth Amendment right to counsel had not attached, that right nonetheless was implicated in the appearance of his attorney before the grand jury. The court believed that if John Doe appeared and gave evidence to the grand jury that would be material in a future prosecution, he would be disqualified from representing petitioner if an indictment subsequently were returned. 759 F.2d at 971-973. The panel majority concluded that because of this potential for disqualification, the subpoena should not be enforced unless the government made a preliminary showing that the information sought was necessary to the grand jury's investigation and that there was no reasonably available source for the information other than the attorney. *Id.* at 976-977.

3. On April 22, 1985—after the panel rendered its decision but prior to the filing of the government's petition for rehearing—petitioner and other alleged members of his crew were indicted on various charges of conspiracy to violate the narcotics laws (21 U.S.C. 848); participating in multiple violations of the Hobbs Act and Travel Act (18 U.S.C. 1951, 1952); and transporting stolen property interstate (18 U.S.C. 2314). The return of the indictment on these counts was made necessary by the imminent expiration of the statute of limitations. However, petitioner was not indicted on the RICO conspiracy count, for which the grand jury is seeking the fee information from attorney

John Doe pursuant to the subpoena duces tecum at issue here. Pet. App. 6a.

4. On January 9, 1986, the en banc court of appeals vacated the panel's decision and affirmed the district court's denial of the motion to quash. Pet. App. 1a-54a.

a. The en banc court of appeals first addressed the issues as they were presented when the district court denied John Doe's motion to quash, which was prior to the return of the indictment charging petitioner and certain co-defendants with offenses other than the RICO conspiracy count the grand jury is still investigating. Viewing the matter from that perspective, the court of appeals held that there was no basis to require a preliminary showing as a prerequisite to enforcing a grand jury subpoena issued to the attorney for an unindicted target of the investigation. Pet. App. 7a-22a.

The court held that the Sixth Amendment right to counsel does not attach when the grand jury is still considering whether to return an indictment, because " 'adversary judicial proceedings have [not been] initiated' " against the target (Pet. App. 8a-10a, quoting *Kirby* v. *Illinois*, 406 U.S. 682, 688-690 (1972) (plurality opinion)). For this reason, the court concluded, petitioner's "interest in continuing to be represented by his present counsel [is] not of constitutional dimensions" (Pet. App. 10a). The court also rejected petitioner's argument that enforcement of the subpoena would violate his "potential" Sixth Amendment right to counsel by "set[ting] the stage for [his] attorney's forced withdrawal" if an indictment should be returned (*id.* at 10a-11a (emphasis and footnote omitted)). The court declined to "adopt what amounts to a *per se* rule that testimony of an attorney before a grand jury as to benefactor payments inevitably will lead to disqualification of that attorney from representing his client" (*id.* at 11a-12a). In addition, the

court observed that numerous contingencies must occur "[b]efore disqualification can even be contemplated," and it "decline[d] to speculate that all those events will occur" (*id.* at 12a).

The en banc court also rejected petitioner's contention that the Due Process Clause of the Fifth Amendment guarantees a grand jury target's interest in being represented by counsel of his choice and that the Fifth Amendment therefore requires a preliminary showing of need before such a subpoena could be enforced (Pet. App. 13a-16a). The court concluded that "the cases simply do not support the proposition that [petitioner's] due process rights under the Fifth Amendment are more expansive than the protection which the Sixth Amendment affords" (*id.* at 15a).

Because no constitutional rights of the grand jury target are implicated in this setting, and because "there is no statutory or common law privilege protecting the information which the grand jury seeks to have disclosed" (Pet. App. 16a-17a),[2] the court found no justification for hampering the grand jury by requiring a preliminary showing of need when the client is an unindicted target. The court explained (*id.* at 19a):

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[2]The en banc court noted that "absent special circumstances not present here, disclosure of fee information and client identity is not privileged even though it might incriminate the client" (Pet. App. 17a-18a, citing, inter alia, *In re Shargel*, 742 F.2d 61, 63 (2d Cir. 1984)). The court continued (Pet. App. 18a (footnote omitted)):

> Moreover, at the time a benefactor offers an attorney payment for the legal representation of others, the attorney should be aware that fee information is not privileged and, indeed, should explain to his client that a potential conflict may arise. Aware of the potential conflict at this initial stage of communication, the attorney and client later should not be heard to complain that disclosure of benefactor payments might chill their relationship of trust. This is a self-imposed problem that very well could have been avoided.

> To create new standards for obtaining fee information at the grand jury stage risks unacceptable interruption of the grand jury process and inevitable probing into what information the grand jury already has in order to determine whether a heightened "need" standard has been met. To allow a grand jury target to challenge the subpoena on the basis of a "need" requirement would seriously jeopardize the secrecy of the proceeding and the grand jury's investigative functions.

The court recognized the need to prevent "arbitrary and unnecessary disqualification of an attorney" (*id.* at 22a). But it held that the potentially competing interests at stake should be examined at the pretrial stage (if an indictment is returned), not at the grand jury stage (*ibid.*).

b. The en banc court next held that a different result was not required here because petitioner had been indicted on the non-RICO counts subsequent to the district court's decision, and his Sixth Amendment right to counsel had accordingly attached with respect to those counts (Pet. App. 23a-26a). The court stressed that the fee information remains unprotected by the attorney-client privilege, despite the indictment (*id.* at 23a-24a). The court also stressed that the asserted right to counsel of one's choice is not absolute and must give way "where the public interest in maintaining the integrity of the judicial system outweighs the accused's constitutional right" (*id.* at 24a). In the court's view, enforcement of the subpoena would not necessarily deprive petitioner of continued representation by his attorney, because the indictment did not make disqualification at trial any less speculative than it was before his indictment. Adequate protection against arbitrary disqualification of petitioner's chosen counsel could be afforded when the prospect of disqualification became concrete (*ibid.*):

> The risk of disqualification should remain for determination at an *in limine* hearing by the trial judge who must weigh the probative value of the information the government seeks against the loss of counsel of the accused's choice.

The court also recognized that petitioner's right to counsel of choice entitled him to "be free of unduly burdensome interruption of his counsel's trial preparation" with respect to the counts on which petitioner already had been indicted (Pet. App. 24a). However, it found that the standards under Rule 17(c), "informed by Sixth Amendment considerations," could adequately protect against improper interruptions of counsel's ability to prepare for trial (Pet. App. 24a). Because the record before it was "comprehensive" and because John Doe's appearance before the grand jury already had been delayed for more than year, the en banc court itself made the required determination under Rule 17(c), rather than remanding the case to the district court for reconsideration in light of the intervening indictment (Pet. App. 25a). In making this determination, the court found that the subpoenaed information is "highly probative" of petitioner's possible role as the head of a criminal enterprise (*ibid.*). The court further observed that although John Doe is engaged in the defense of the charges in the indictment that already has been returned, "trial is not imminent, and there is no reason to anticipate that [John Doe's] appearance at the grand jury for a limited inquiry will be time-consuming" (*id.* at 26a).[3]

5. After the en banc court of appeals rendered its decision, petitioner moved for a stay of the mandate to enable him to file a petition for a writ of certiorari. However, the

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[3]Chief Judge Feinberg and Judge Cardamone dissented (Pet. App. 28a-32a, 33a-54a).

court of appeals instead ordered that issuance of the mandate be stayed only for 10 days, until February 10, 1986 at 4:00 p.m., solely to permit petitioner to apply to this Court for a further stay. Because no stay was granted by this Court within the time allowed, the court of appeals' mandate issued as scheduled on February 10, 1986.

Petitioner did submit an application for a stay on February 10, 1986, in the form of an affidavit of counsel. By order dated February 19, 1986, Justice Marshall denied the application. No. A-610. By letter dated February 20, 1986, counsel for petitioner requested that the application be resubmitted to Justice Brennan. Counsel represented in that letter (at 2) that petitioner was scheduled to appear before the grand jury on February 27, 1986, and that it was most likely that once the subpoena was enforced, the issues raised in the certiorari petition "will be rendered moot for purposes of this Court's review." Justice Brennan nevertheless denied petitioner's renewed application by order dated February 24, 1986. No. A-610.

We have been informed by the Office of the Organized Crime and Racketeering Strike Force in the Eastern District of New York that John Doe appeared before the grand jury as scheduled on February 27, 1986, and furnished some evidence. The selection of the jury in the trial on those counts for which an indictment has already been returned is now scheduled to begin on May 12, 1986.

ARGUMENT

John Doe's appearance before the grand jury on February 27, 1986, apparently has largely mooted the issues presented in the petition for a writ of certiorari. In any event,

the thorough decision of the en banc court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Review by this Court therefore is not warranted.

1. a. Petitioner does not challenge the court of appeals' holding (Pet. App. 17a-18a) that the fee information the grand jury seeks from his attorney, John Doe, is not protected by the attorney-client privilege. Petitioner nevertheless argues that the district court should have granted John Doe's motion to quash the grand jury subpoena seeking that information unless the government first satisfied the district court of the need for the information and the absence of reasonably available alternatives. This Court, however, has declined to impose such threshold requirements for the enforcement of a grand jury subpoena. See *United States* v. *Dionisio*, 410 U.S. 1, 15-17 (1973).

b. Petitioner argues (Pet. 11-12, 15-16) that, even where the client is only a target of the grand jury's investigation and has not yet been indicted, the Sixth Amendment requires a showing of need and the absence of reasonable alternatives. However, it is clear that the Sixth Amendment right to counsel attaches only *after* the initiation of adversary judicial proceedings against the defendant, by indictment or otherwise. *Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), slip op. 14-18; *United States* v. *Gouveia*, No. 83-128 (May 29, 1984), slip op. 6-8. The Sixth Amendment therefore furnishes no basis for quashing the subpoena against the attorney for the target of the grand jury's investigation.

c. The premise of petitioner's contrary argument appears to be that if a target's attorney is required to furnish fee information to the grand jury, the attorney will necessarily be disqualified from representing the target in the criminal prosecution if an indictment is returned. In petitioner's

view, that possibility interferes with the target's *potential* Sixth Amendment right to counsel. See Pet. 15-16. There are several flaws in this reasoning.

First, petitioner's premise that disqualification of an attorney at trial is an inevitable result of requiring him to appear before a grand jury to testify about benefactor payments is plainly wrong (Pet. App. 12a):

> Before disqualification can even be contemplated, the attorney's testimony must incriminate his client; the grand jury must indict; the government must go forward with the prosecution of the indictment; and ultimately, the attorney must be advised that he will be called as a trial witness against his client.

Even then, as the court of appeals explained, disqualification is not certain. "[T]he government may decide not to use such information at trial, or * * * the information may be presented at trial in such a way that the attorney can avoid testifying, or * * * the trial judge may rule *in limine* that the information is not admissible, perhaps because its probative force does not justify a resulting disqualification of counsel" (*ibid.* (footnotes omitted)).

Second, as the court of appeals observed, even where the Sixth Amendment right to counsel has attached, it does not afford the accused an absolute right to counsel of his choice; the accused is protected, if at all, only against an arbitrary disqualification of counsel. Pet. App. 24a; see also *United States* v. *Flanagan*, 679 F.2d 1072, 1075 (3d Cir. 1982), rev'd on other grounds, 465 U.S. 259 (1984). Any right to counsel of choice accordingly must give way if required by " 'the fair and proper administration of justice' " (Pet. App. 24a (citation omitted)). This Court has consistently affirmed the grand jury's historically recognized right to "every man's evidence." See *United States* v. *Calandra*, 414 U.S.

338, 342-346 (1974); *United States* v. *Dionisio*, 410 U.S. at 16-17; *Branzburg* v. *Hayes*, 408 U.S. 665, 686-688 (1972). Requiring an attorney to furnish a grand jury with relevant information about the amount of money he received from a target in the same manner as any other recipient of payments might be required to furnish such information in itself refutes any suggestion of arbitrary treatment.[4] In addition, even if the attorney's furnishing of evidence to the grand jury should eventually lead to a requirement that he also testify at trial (but see pages 4-5, 10, *supra*), the attorney's disqualification would simply be the result of application of the established ethical principle that a person should not be both a witness and a lawyer in the same case. See *In re Klein*, 776 F.2d 628, 633 (7th Cir. 1985). That result is scarcely arbitrary.[5]

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[4]This conclusion is supported by *Branzburg* v. *Hayes, supra*, which held that any chilling effect upon First Amendment rights occasioned by disclosure of a news reporter's confidential sources did not justify imposing a requirement that the government demonstrate, inter alia, that there were no alternative sources for the information. The Court explained that there was (408 U.S. at 690-691)

> no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation.

[5]We note as well that the Department of Justice has adopted internal guidelines that address the subject of subpoenas directed to attorneys. Those guidelines provide that there must be reasonable grounds to believe that the information sought is needed for the successful completion of the investigation and that reasonable attempts must first be made to secure the information from a source other than the attorney. U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-2.161(a) (July 18, 1985).

d. As petitioner concedes, a number of courts of appeals have specifically rejected the contention that a special showing of need is necessary to support enforcement of a subpoena in a case such as this. See Pet. 11, citing *In re Klein*, 776 F.2d at 632-634; *In re Grand Jury Proceedings (Weiner)*, 754 F.2d 154, 156 (6th Cir. 1985); *In re Freeman*, 708 F.2d 1571, 1575 (11th Cir. 1983); *In re Grand Jury Proceedings (Wilson)*, 760 F.2d 26 (1st Cir. 1985); *United States* v. *Morchower*, 718 F.2d 1093 (4th Cir. 1983) (Table). See also *United States* v. *(Under Seal)*, 774 F.2d 624 (4th Cir. 1985), petition for cert. pending, No. 85-1100; *In re Grand Jury Investigation*, 769 F.2d 1485, 1487 (11th Cir. 1985); *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221, 1222 n.1 (9th Cir. 1983); cf. *In re Osterhoudt*, 722 F.2d 591, 594-595 (9th Cir. 1983). Petitioner also cites (Pet. 11-12) the Fourth Circuit's decision in *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (1982). But as he acknowledges, the Fourth Circuit subsequently granted rehearing en banc in that case and then vacated the panel's decision because the target became a fugitive. *In re Special Grand Jury No. 81-1 (Harvey)*, 697 F.2d 112 (1982). The panel decision in *Harvey* therefore is of no precedent even in the Fourth Circuit. See *United States* v. *Ricks*, 776 F.2d 455, 465 (4th Cir. 1985); *United States* v. *Morchower, supra*.[6] Thus, there is no circuit conflict on the questions presented.[7]

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[6]Petitioner also cites (Pet. 12) the First Circuit's decision in *In re Grand Jury Matters*, 751 F.2d 13 (1984). However, as the First Circuit subsequently explained, that decision was based on "unique factors," including the timing of the subpoena and a finding of harassment. *In re Grand Jury Proceedings (Wilson)*, 760 F.2d at 27. We have discussed these First Circuit decisions at greater length in our memorandum in opposition (at 6-7) in *Doe* v. *United States*, petition for cert. pending, No. 85-1100. We have furnished counsel for petitioner with a copy of that memorandum.

[7]Petitioner also argues (Pet. 18-19) that the Due Process Clause should be construed to require a threshold showing of need as a prerequisite to enforcement of a subpoena issued to the attorney for the

2. As the court of appeals held (Pet. App. 23a-26a), a different result is not required here simply because petitioner has now been indicted on certain charges. That indictment of course does not alter the fact that the fee information the grand jury seeks is not protected by the attorney-client privilege or by any other privilege (*id.* at 23a-24a). Moreover, petitioner has not been indicted on the RICO conspiracy charges, in connection with which the grand jury seeks the information regarding benefactor payments, and he therefore still has no Sixth Amendment right to counsel (or to counsel of his choice) as regards any prosecution for that offense. It is irrelevant for these purposes that petitioner concededly does have a right to counsel in connection with the counts on which he already has been indicted. *Moran* v. *Burbine*, slip op. 16-18; *Maine* v. *Moulton*, No. 84-786 (Dec. 10, 1985), slip op. 18-20; *Hoffa* v. *United States*, 385 U.S. 293, 307-309 (1966).

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unindicted target of a grand jury investigation because of the potential for disqualification of the attorney at a subsequent trial. However, the court of appeals correctly rejected the notion that the Fifth Amendment furnishes broader protection to the interest in being represented by counsel of one's choice than does the Sixth Amendment. See Pet. App. 13a-16a. At most, the Due Process Clause would protect only against the arbitrary denial of chosen counsel. See *United States* v. *Flanagan*, 679 F.2d at 1075. As explained in the text, there has been no such arbitrary denial here.

Petitioner's related contention (Pet. 19-20) that a grand jury subpoena issued to an attorney should be quashed as a matter of course in the exercise of the court's supervisory powers—on the ground that it is "unreasonable or oppressive" within the meaning of Fed. R. Crim. P. 17(c) because of the possible impact on subsequent representation of the target by the attorney—is without merit for similar reasons. The court of appeals considered whether the subpoena should be quashed under Rule 17(c) in the particular circumstance of this case and concluded that it should not (Pet. App. 25a-26a). That fact-bound determination does not warrant review by this Court.

Nor does the return of the indictment alter the balance of the relevant factors. The indictment does not, for example, undermine the grand jury's right to receive evidence from every person, including non-privileged information from an attorney, in connection with legitimate continuing investigations. Moreover, the court of appeals specifically found no indication that John Doe's appearance before the grand jury would be time-consuming or would otherwise detract from his representation of petitioner in connection with the upcoming trial (Pet. App. 25a-26a). The impact of John Doe's grand jury appearance on the propriety of his continued representation of petitioner at the upcoming trial also remains speculative. That impact necessarily depends on whether any evidence John Doe may give is incriminating, whether the government would seek to use that evidence at trial, and whether, if it did, the evidence could be introduced in a manner that would not require John Doe to testify and to be disqualified under the attorney-witness rule. These factors all can be considered by the district court at the appropriate time prior to trial. And if disqualification ultimately were to be required, it would be because John Doe possessed relevant, incriminating, and non-privileged information about petitioner. Any interference on that basis with petitioner's asserted right to counsel of his choice would not be arbitrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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